

**Before the  
FEDERAL COMMUNICATION COMMISSION  
Washington, D.C. 20554**

In re Applications of	) CC Docket No. 91-142
	)
ALABAMA WIRELESS, INC., formerly	)
ALGREG CELLULAR ENGINEERING	) File No. 10607-CL-P-307-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 307, Alabama 1- Franklin	)
	)
CRANFORD CELLULAR COMMUNICATIONS	) File No. 10611-CL-P-311-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 311, Alabama 5- Cleburne	)
	)
BAY CELLULAR OF FLORIDA	) File No. 10754-CL-P-497-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 497, Mississippi 5-	)
Washington	)
	)
FLORIDA CELLULAR	) File No. 10445-CL-P-505-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 505, Missouri 2- Harrison	)
	)
A-1 CELLULAR COMMUNICATIONS	) File No. 10454-CL-P-514-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 514, Missouri 11- Moniteau	)
	)
BRAVO CELLULAR, LLC, formerly	)
BRAVO CELLULAR	) File No. 10673-CL-P-579-A-89
	)
For facilities in the Domestic Public Cellular	)
Telecommunications Radio Service on Frequency	)
Block A, in Market 579,	)
North Carolina 15-Cabarrus	)
	)
	)

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OHIO WIRELESS, LLC, formerly	)	
ALPHA CELLULAR	)	
	)	File No. 10909-CL-P-586-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 586, Ohio 2, Sandusky	)	
	)	
CEL-TEL COMMUNICATIONS OF OHIO, LLC,	)	
formerly CEL-TEL COMMUNICATIONS	)	File No. 10912-CL-P-589-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 589, Ohio 5- Hancock	)	
	)	
EJM CELLULAR PARTNERS	)	File No. 10567-CL-P-596-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 596, Oklahoma 1-Cimarron	)	
	)	
PINELLAS COMMUNICATIONS	)	File No. 10808-CL-P-613-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 613, Pennsylvania 2- McKean	)	
	)	
CENTAUR PARTNERSHIP	)	File No. 10720-CL-P-631-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 631, South Carolina 7-	)	
Calhoun	)	
	)	
SOUTH CAROLINA CELLULAR CORP., formerly	)	
SIGNAL CELLULAR COMMUNICATIONS	)	File No. 10721-CL-P-632-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 632, South Carolina 8-	)	
Hampton	)	
	)	
A-1 CELLULAR COMMUNICATIONS	)	File No. 10409-CL-P-661-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 661, Texas 10- Navarro	)	
	)	

EJM CELLULAR PARTNERS	)	
	)	File No. 10116-CL-P-721-A-89
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 721, Wyoming 4- Niobrara	)	
	)	
JAYBAR COMMUNICATIONS	)	File No. 10042-CL-P-323-A-88
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 323, Arizona 6-Graham,	)	
for Station KNKN251	)	
	)	
DATA CELLULAR SYSTEMS	)	File No. 10029-CL-P-345-A-88
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A in Market 345, California 10-Sierra, for	)	
Station KNKN250	)	
	)	
CELLULAR PACIFIC	)	File No. 10031-CL-P-346-A-88
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A in Market 346, California 11-El Dorado, for	)	
Station KNKN252	)	
	)	
NORTH AMERICAN CELLULAR	)	File No. 10066-CL-P-388-A-88
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on Frequency	)	
Block A, in Market 388, Idaho 1-Boundary, for	)	
Station KNKN253	)	
	)	

To: The Commission

### **JOINT REPLY TO OPPOSITION TO MOTION TO STRIKE**

Alabama Wireless, Inc., formerly Algrec Cellular Engineering ("Algrec"), Cranford  
Cellular Communications ("Cranford"), Bay Cellular of Florida ("Bay"), Florida Cellular,  
("Florida"), A-1 Cellular Communications (A-1), Bravo Cellular, LLC, formerly Bravo Cellular

("Bravo"), Cel-Tel Communications of Ohio, Ltd., formerly Cel-Tel Communications ("Cel-Tel"), EJM Cellular Partners ("EJM"), Pinellas Communications ("Pinellas"), Centaur Partnership ("Centaur"), Ohio Wireless, LLC, formerly Alpha Cellular ("Alpha"), South Carolina Cellular Corporation, formerly Signal Cellular Communications ("Signal"), Jaybar Communications ("Jaybar"), Data Cellular Systems ("Data"), Cellular Pacific ("CP"), and North American Cellular ("North American") (collectively, "Licensees"), by their attorneys, file herewith their Reply to the "Opposition to Motion to Strike" which was filed on August 5, 1998 on behalf of the "Turnpike Group."<sup>1</sup>

### **Introduction**

On July 3, 1997, the Turnpike Group, nine former applicants for initial authorizations in at least some of the above markets, none of which had previously participated in this proceeding, tendered notices of appeal to the United States Court of Appeals for the District of Columbia Circuit from the Commission's decision in *Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997). That court, in response to petitions to dismiss filed by Licensees and supported by the Commission, dismissed those appeals for failure to comply with the requirement of Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), that a condition precedent for a non-party to seek appellate review was the filing of a petition for reconsideration of the Commission order from which review was sought. *Turnpike Cellular Partners v. FCC*, Consolidated Case Nos. 97-1421 and 97-1423, *dismissed*, January 30, 1998, *reh. denied*, March 30, 1998. The

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<sup>1</sup> The "Turnpike Group" consists of Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., Scott Reardon, Skyline Cellular Partners, Sunrise Trust, Walker Trust, and Turnpike Cellular Partners.

Turnpike Group did not seek Supreme Court review of the actions of the District of Columbia Circuit and the time to do so has expired.

On June 26, 1998, the Turnpike Group tendered to the Commission in this proceeding a “Statement for the Record,” in which the Turnpike Group asserted that it had “elected to participate” in the instant proceedings, *i.e.*, to join these proceedings as parties.<sup>2</sup> The Statement made no reference to any of the provisions of the Communications Act<sup>3</sup> or the Commission’s Rules<sup>4</sup> governing admission of “parties in interest” to hearing proceedings such as this one and advanced no facts which would tend to support such admission. Consequently, on July 22, 1998, Licensees filed a *Joint Motion to Strike So-Called “Statement for the Record,”* which pointed out the deficiencies in the *Statement for the Record* and asked that it be stricken. Among other things, the *Joint Motion* demonstrated that the *Statement for the Record*, considered as a petition to intervene in this hearing proceeding, was barred by Section 309(e) of the Act and Section 1.223(c) of the Rules, and considered as a petition for reconsideration, was barred by Section 405(a) of the Act and Section 1.106 of the Rules.<sup>5</sup>

#### **The Turnpike Group May Not Become Parties to This Proceeding.**

1. As noted above, the Turnpike Group members have sought to become parties to this proceeding by simple assertion. But there is no basis in the Communications Act or the

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<sup>2</sup> *Statement for the Record* at 7. The Turnpike Group grudgingly recognized that the court had found that the Turnpike Group were not parties to this proceeding, *id.* at 6, a finding that it is now beyond the Turnpike Group’s power to contest.

<sup>3</sup> Sections 309(e) and 405, 47 U.S.C. §§ 309(e), 405(a).

<sup>4</sup> §§ 1.106(b)(1) and (f); 1.223(c).

<sup>5</sup> *See Joint Petition* at 8-14.

Commission's rules or policies for such a procedure, and the Turnpike Group has pointed to none in either its original filing or in its August 5 Opposition. Indeed, in neither filing has the Turnpike Group even mentioned Section 309(e) or 405(a) of the Act or Section 1.106 or 1.223(c) of the Rules, even to attempt to answer the *Joint Motion*.

But the Turnpike Group cannot make those provisions go away by ignoring them. Both the Communications Act and the Commission's Rules specify that to become a party to this proceeding a "party in interest" must seek and be granted leave to intervene. The Turnpike Group has filed no such petition and the facts, including its arguments, clearly establish that any such petition must be rejected, which is perhaps why none was filed.

To summarize, there is a statutory right to intervene, spelled out in Section 309(e) of the Act, 47 U.S.C. § 309(e). To claim this right, a "party in interest" must file its petition "not more than thirty days after publication of the hearing issues . . . in the Federal Register," which occurred on June 21, 1991, some seven years before Turnpike Group tendered its *Statement for the Record*. Any statutory right to intervene has therefore long since expired.

Section 1.223(c) of the Commission's Rules grants the presiding officer limited authority to allow intervention after the expiration of the 30-day period, but only if the required showing is made. Section 1.223(c) provides that:

Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the Federal Register [of the hearing issues] . . . must set forth reasons why it was **not possible** to file a petition within the . . . [30 days] prescribed by paragraphs (a) and (b) of this section. (Emphasis supplied.)

The Turnpike Group has set forth no such reasons, as indeed it could not, since obviously it **was** possible for the Turnpike Group to file a timely petition to intervene.

2. In its *Statement for the Record*, the Turnpike Group asserted that it

seek[s] reconsideration of the Commission's decision on the same factual and legal bases as those set forth in the petitions for reconsideration already on file.<sup>6</sup>

But the Turnpike Group cannot "seek reconsideration" except by filing a petition for reconsideration, and it was barred by the Act and the Rules from doing so on June 26, 1998, the date of its *Statement for the Record*, on two grounds. First, the Turnpike Group filing is grossly out of time. Section 405(a) of the Act provides that a petition for reconsideration "must" and Section 1.106(f) provides that it "shall" be filed within 30 days from the date public notice is given of the order complained of. The Commission order the Turnpike Group complains of was released on June 3, 1997, more than a year before the *Statement for the Record* was tendered.<sup>7</sup>

Second, Section 1.106(b)(1) of the Rules provides that a petition filed by a non-party to the proceeding

shall show good reason why **it was not possible** for him to participate in the earlier stages of the proceeding. (Emphasis supplied.)

This, of course, is the same hurdle the Turnpike Group did not even try to and could not jump in connection with a petition to intervene. For the foregoing reasons, the Commission is barred from permitting the Turnpike Group to insinuate itself into this proceeding by accepting its

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> The Turnpike Group of course knew of the 30-day filing deadline following release of the Commission's June 3, 1997 Order. Acting through experienced communications counsel, it made the deliberate election to disregard Section 405(a) of the Communications Act by tendering notices of appeal from the Order without ever having participated in this Commission proceeding in any way. This conduct would provide no basis for a Commission waiver of the 30-day deadline in Section 405(a) for filing a petition for reconsideration, even if the Commission had authority to waive the statutory requirement.

*Statement for the Record* as a petition for reconsideration.<sup>8</sup>

The essence of the Turnpike Group's position is that it was taken by surprise by the Commission's resolution of the case.<sup>9</sup> But it could not stand on the sidelines in the expectation of a specific outcome and then have the right to join the proceeding because it was surprised at the decision. As the D.C. Circuit held many years ago in *Red River Broadcasting Co. v. FCC*, 98 F.2d 282, 286-287 (D.C. Cir. 1938):

To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation. . . [S]uch a procedure would permit successive appeals by many persons and as a result a complete blocking of administrative action.

Moreover, as noted above, the Turnpike Group first presented itself to the Commission not when the Commission decided the case, but more than a year later.

As we made clear in the *Joint Motion*, and as Commission counsel made clear to the District of Columbia Circuit in the course of the successful effort to obtain the dismissal of the

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<sup>8</sup> In its *Memorandum Opinion and Order and Order on Reconsideration in the Matter of Daniel R. Goodman, Receiver; Dr. Robert Chan*, released July 31, 1998 (FCC 98-167), the Commission held that it had no jurisdiction to entertain one petition for reconsideration filed one business day late (¶ 25), and another filed 24 days late (¶ 26). Moreover, a "Motion for Clarification" was treated as petition for reconsideration because it sought reconsideration (¶ 26); here, too, the Turnpike Group can obtain no advantage by calling its document a "Statement for Record."

<sup>9</sup> Turnpike Group Opposition at 7-8. There was no ground for surprise other than a bad guess as to how the Commission would decide the basic issue as to the nature of the Mutual Contingent Risk Sharing Agreements, *i.e.*, whether they conferred on parties to those agreements ownership interests in more than one application in the same market, contrary to the RSA Cellular rules. That issue was clearly present in the case throughout, even though its procedural status was such that, following the release of the Hearing Designation Order, the issue had to await resolution in the first instance by the Commission itself. *See Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5122-23 (1994) (Rev. Bd.); *Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8157 (1997).



Turnpike Group's appeals, if the Turnpike Group were allowed to join as parties now, all semblance of orderly procedure would be lost, and the Commission would have no way to bring proceedings such as this to a close.<sup>10</sup>

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<sup>10</sup> See *Joint Petition* at 9-14 and *FCC Comments in Support of Motions to Dismiss* at 15-16, filed in Case No. 97-1421 on September 23, 1997, and quoted in the *Joint Motion* at 10.

For all of the foregoing reasons, the Motion to Strike should be granted.

Respectfully submitted,

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Pinellas Communications  
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August 17, 1998

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the firm of Koteen & Naftalin, L.L.P., hereby certify that on the 17th day of August, 1998, copies of the foregoing "Joint Reply to Opposition to Motion to Strike" were deposited in the U.S. mail, postage prepaid, and delivered by hand where indicated, to the following :

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